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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 United States of America,

10 Plaintiff,

11 v.

12 Demetrius Verardi Ramos,

13 Defendant.
14

No. CR-20-00051-002-TUC-JAS (DTF)

**REPORT AND
RECOMMENDATION**

15 Before the Court are Defendant Demetrius Ramos's motions to suppress statements
16 (Doc. 88), to suppress evidence following unlawful seizure and arrest (Doc. 89), and to
17 dismiss the indictment (Doc. 94).¹ Defendant seeks to suppress statements and evidence
18 recovered following the stop, such as two cell phones, and dismissal of the case. (Doc. 88
19 at 1, Doc. 94 at 1, Doc. 194 at 28.) This case has been assigned to the undersigned for
20 report and recommendation pursuant to LRCrim 5.1. (Doc. 10.) The motions came before
21 the Court for an evidentiary hearing on September 1, 2020, and October 8, 2020. (Docs.
22 163, 173.) Magistrate Judge Ferraro recommends that the District Court, after its
23 independent review, deny Defendant's motions.

24 **FACTUAL BACKGROUND**

25 **Surveillance**

26 On December 3, 2019, in Douglas, Arizona, agents from the Border Patrol Disrupt

27
28 ¹Defendant requests the Court take judicial notice of the deposition and grand jury
testimony. (Doc. 127.) The Court has reviewed the items in the record, including the
requested transcripts.

1 and Deny Unit conducted surveillance on a “stash house” within three miles of the
2 international border,² where there had been recent smuggling activity. (Doc. 164 at 47-48,
3 190, 232; Doc. 177 at 15.) Agent Daniel Regan testified that, approximately a month before
4 the incident, he had “seen illegal aliens coming out of that resident.” (Doc. 177 at 12, 15.)
5 Agent Brad Albertson attested he had known that an “alien smuggling coordinator” lived
6 at the stash house based on a previous case. (Doc. 164 at 44, 48.) While conducting
7 surveillance, Agent Albertson saw the known alien smuggling coordinator come in and out
8 of the house, and “look up and down the street as if he was waiting for somebody.” *Id.* at
9 70. Agent Albertson testified that, around 8:00 p.m., he had “noticed a 2017 Lexus ES 350
10 driving really slowly down 11th Street,” seeming as though “the driver of the vehicle
11 wasn’t too familiar with the area.” *Id.* at 49-50. Later, the agents identified Defendant as
12 the driver. *Id.* at 242. Defendant made a U-turn and drove slowly down the street; he then
13 made a second U-turn, and “slowly roll[ed] back down.” *Id.* at 50-51. The car “turned into
14 the driveway where the carport area is and just parked right in front of the house, turned
15 off the headlights and waited for a second.” *Id.* 51. Four people ran from the carport—
16 crouching as they did so—and tried to get into the car. *Id.* at 53. Defendant let three
17 individuals in the car but turned the fourth away. (Doc. 177 at 59; Exh. 12 at 15:17-20,
18 36:8-9.) Agents believed all four individuals were in the car. (Doc. 164 at 80.)

19 Agents testified they had followed Defendant as he drove and noted Defendant’s
20 driving had been “evasive,” as though he believed someone was following him. *Id.* at 57,
21 75, 232. He returned to the stash house and told the passengers to get out. (Doc. 177 at 63.)
22 Two agents testified that they had seen only two individuals go back toward the house.
23 (Doc. 164 at 59, 194.) As Defendant drove away from the residence, agents followed him.
24 *Id.* at 194.

25 Agent Walter Brown testified that he had seen Defendant drive into and
26 immediately out of a parking lot and then turn into the next driveway, a gas station. *Id.* at

27
28 ²Agents testified that they stopped Defendant within three or four miles of the international
border. (Doc. 177 at 223, 263.) Exhibits show that the stash house is between where agents
stopped Defendant and the international border. (Exh. 4.)

1 189, 195. For four to five minutes, the agents lost visual contact with Defendant, but they
2 knew that he had left the gas station quickly after pulling in. *Id.* at 196, 224. Agents testified
3 that they next saw Defendant at a second gas station, but he quickly left before they could
4 contact him. *Id.* at 237-38.

5 **Stop/Knock-and-Talk/Arrest**

6 Agents followed Defendant as he left Douglas. *Id.* at 198-99. At approximately 8:30
7 p.m., Agents Walter Brown and Jesus Barron stopped Defendant. *Id.* at 189, 199, 213, 230.
8 Agent Barron spoke with Defendant as Defendant sat in his car. *Id.* at 216. The agents
9 testified that they had not seen anyone other than Defendant in the car. *Id.* at 200, 239.
10 Agent Barron asked if he could inspect the trunk, to which Defendant agreed. *Id.* at 200,
11 263. No one was in the trunk. *Id.* Agent Barron testified that Defendant had appeared “very
12 nervous”—“avoid[ing] eye contact,” “rub[bing] his head” and hands, and “start[ing] to
13 stutter.” *Id.* at 240. He asked Defendant to identify himself, asked him about his citizenship,
14 and asked for Defendant’s driver’s license. *Id.* Defendant provide his name, identified
15 himself as a United States citizen, but refused to give his date of birth or a driver’s license.
16 *Id.* Agent Barron contacted Cochise County Sheriff’s Office to send a deputy because
17 Defendant had been driving without a license. *Id.* at 121, 201. When the deputy arrived, he
18 also asked Defendant for his date of birth and identification. *Id.* at 121-22. Defendant still
19 refused to provide his date of birth or produce a driver’s license. *Id.* at 243-44. Defendant
20 never provided this information, even after multiple requests by two agents and a deputy.
21 *Id.* at 105-06, 243-44.

22 At about 8:45, agents at the stash house decide to conduct a “knock-and-talk.” *Id.*
23 at 62, 88. As agents approached the house, four undocumented immigrants and one United
24 States citizen fled out of the back door and attempted to climb over the back fence. (Doc.
25 177 at 23-24.) But agents apprehended them. *Id.* Agent Albertson testified that there had
26 been “food trash, trash that’s associated with illegal alien smuggling” at the side of the
27 house, and that in the house there had been a “bunch of like camouflage clothing” and more
28 trash. (Doc. 164 at 64, 66.) According to Agent Albertson, he identified two of the

1 undocumented immigrants as the individuals he had seen running from Defendant's car
2 about thirty to forty-five minutes after he had entered the house. *Id.* at 93.

3 At approximately 9:00, agents permitted Defendant to call his lawyer. (Doc. 164 at
4 201; Doc. 177 at 76-77.) Defendant attempted to call his attorney twice, but he was unable
5 to reach him. (Doc. 177 at 74-75.) Defendant then he called a friend in law enforcement.
6 (Doc. 177 at 76, 101; Exh. 62 at A3.) The agents were able to hear these calls because
7 Defendant was using a speaker. (Doc. 164 at 106, 201, 244.) While Defendant was on his
8 law-enforcement friend call, the agents received information that the two individuals who
9 had run from Defendant's car were undocumented. *Id.* at 124. Agents testified that, after
10 receiving this new information, they had informed Defendant he was under arrest and read
11 him his *Miranda* rights. *Id.* at 203, 213, 245. Agent Brown testified this had occurred at
12 9:35, but a careful review of the record indicates that the call ended around 9:20.³ (*Id.*; Exh.
13 62 at A3.) Immediately after this call Defendant was advised he was under arrest. (Doc.
14 164 at 108.) Then Defendant requested to call his wife, which agents permitted; he spoke
15 with her at approximately 9:25. (Doc. 177 at 76; Exh. 62 at A3.)

16 **At the Station**

17 Agents transported Defendant to the Douglas Border Patrol Station and placed him
18 in a cell. (Doc. 177 at 78.) At some point, Defendant asked for some prescription
19 medication from his car. *Id.* at 27-28. When agents took Defendant's fingerprints, an agent
20 checked if Defendant was okay because he had needed the medication. *Id.* at 27. An agent
21 helped him get the medication. *Id.* The timing of the conversation and fingerprinting is
22 unclear.⁴

23 Agent Robert Marrufo⁵ discovered that Defendant was not a United States citizen
24 and that his visa had expired. (Doc. 164 at 99, 109.) At approximately 3:40 a.m., Agent
25 Marrufo went into Defendant's cell to conduct a welfare check and to inform him that the

26 ³The Court does not find this difference to be significant but notes it.

27 ⁴The Court believes there is some ambiguity that neither party clarified as to when this
28 conversation took place. It is possible this was one conversation occurring as agents took
Defendant's fingerprints or this was two conversations where the latter occurred as agents
took Defendant's fingerprints. (Doc. 177 at 27-28.)

⁵Since this incident, Agent Marrufo has retired. (Doc. 164 at 99.)

1 agents knew he was unlawfully in the United States. *Id.* at 110, 112. About forty minutes
2 later, Agent Marrufo again entered Defendant's cell and showed him a plastic bag. (*Id.* at
3 112-13; Exh. 70 at 2:34-2:35.) At the evidentiary hearing, Defendant claimed that an agent
4 had come into his cell, had shown him a plastic bag with laboratory results indicating
5 narcotics had been found in his car, and had told him that if he talked to the agents they
6 would not "use" the narcotics against him. (Doc. 177 at 85-86.) After prompting from his
7 attorney, Defendant identified this agent as Agent Barron. *Id.* at 82, 85. The Assistant
8 United States Attorney (AUSA) asserts that the agent on the video was Agent Marrufo, and
9 Agent Marrufo testified about going into the room. (Doc. 164 at 111; Doc. 174 at 197.)
10 This Court finds that it is more credible that the agent was Agent Marrufo. Agent Marrufo
11 did not recall having a plastic bag or what was in it, but he denied every aspect of
12 Defendant's claim. (Doc. 164 at 115, 127-28.)

13 Agent Marrufo took Defendant into an interrogation room, and Agent Barron read
14 Defendant his *Miranda* rights, once more. (Doc. 164 at 114; Exh. 9 at 3-4.) Defendant
15 explicitly agreed to speak to them without a lawyer. (Exh. 9 at 3-4.) Defendant expressed
16 multiple times that he understood his right to a lawyer. He told the agents, "I know I can,
17 you know, get the lawyer and then, you know, play this stupid game, you know, but I'm—
18 I'm on the receiving end here. You know, I'm overstay with my visa, and I don't want to
19 get deported." *Id.* at 11:5-8. He asked, "Should I get a lawyer right now (indiscernible) like
20 a sense of—like if you—what can be done for me?" *Id.* at 41:1-3. Throughout the
21 interrogation, Defendant tried to see how the agents would "help" him; he offered to "get
22 [them] more information" and wear a "bug." *Id.* at 31:13-21, 35:9-22, 44:24-25, 47:3-8,
23 49:5-7, 50, 54-55. He also said, "I gave up. You know, I can have a lawyer." *Id.* at 44:6-7.

24 In the final mention of a lawyer, Defendant said,

25 Look, man. If you want to catch me for [transporting illegal aliens], I'm going
26 to be just like a sheep, man, all like those guys that—just one more guy doing
27 that. If you guys just want to do that, man, like, yeah, I can call the lawyer,
you know, and situate that shit[.]

28 *Id.* at 48:8-9. However, Defendant never invoked his right to an attorney during the

1 interrogation.

2 Defendant admitted to transporting undocumented immigrants for profit
3 approximately twenty times. *Id.* at 17-18. He also described how he had agreed to transport
4 people from Douglas to Phoenix for a thousand dollars per person on December 3 and how
5 he had worn scrubs so he would not raise suspicions; however, he denied knowing that the
6 three passengers he picked up were undocumented. *Id.* at 13, 16, 36, 40, 42, 47. He said he
7 had “pushed” the fourth person out of the car because he “didn’t really like him” and had
8 a “gut feeling.” *Id.* at 14. During the interrogation, Defendant admitted he was not forced
9 to talk; however, he thought he would get something in return because the agents had “kind
10 of” made promises to him. *Id.* at 52:22-53:10. At the evidentiary hearing, Defendant
11 testified he had been desperate and had “exaggerat[ed]” his involvement so he could go
12 home. (Doc. 177 at 117-18.) The agents were adamant, during the interrogation and at the
13 evidentiary hearing, that they did not make any promises to Defendant or threaten him in
14 anyway. (Doc. 164 at 118-19, 135, 137-38, 250-51, 265-66; Exh. 9 at 45:12-23, 49:8-11,
15 53:11-12.)

16 **Defendant’s Testimony from Evidentiary Hearing**

17 At evidentiary hearing, Defendant testified to his version of the events. He first
18 described his background. (Doc. 177 at 53-55.) Originally, he lived in Brazil and decided
19 to come to the United States to finish school. *Id.* at 53. He graduated with degrees in
20 physiology and nuclear medicine technology. *Id.* In 2017, his H1B visa for high qualified
21 degree holders expired. *Id.* at 54. Afterward, he had difficulty obtaining employment. *Id.*
22 at 55.

23 Turning to the events that led to his arrest, Defendant testified that Gabriel, a friend
24 of his, had offered him a thousand dollars to “pick up passengers to do Christmas shopping
25 in Phoenix.” *Id.* at 56-57. Gabriel told him that Uber would not pick-up passengers so close
26 to the border. *Id.* at 56. The Defendant testified that he had agreed to pick up the passengers
27 from Douglas and take them to Tucson, so they could go Christmas shopping the next
28 morning. *Id.* at 56. Then, he would return them to Douglas. *Id.*

1 Gabriel provided Defendant with a cellphone and an address. *Id.* at 57. Defendant
2 drove to the house and spoke with someone about the shoppers. *Id.* at 58. Four people came
3 to his car, but he refused to transport all four because “the groceries that they ha[d] to buy”
4 would not fit in his car. *Id.* at 59. So, he left the house with three passengers. *Id.* He became
5 suspicious that the passengers were not in the country legally because they were speaking
6 Spanish and would not respond to him in English. *Id.* at 60-61. Defendant then decided to
7 drop the passengers back at the house. *Id.* at 62. He was able to find the house in the dark
8 while talking to Gabriel and using his phone to find the address. *Id.*

9 After dropping off his passengers, Defendant said he had driven to a gas station so
10 he could “get [his] bearings.” *Id.* at 64. However, the first gas station was very dark, and
11 he did not have a “good signal.” *Id.* He went to a second gas station because he was afraid
12 Gabriel and his “ilk” would be mad at him and could be following him. *Id.* at 64-65. Then,
13 he left Douglas. *Id.* at 65.

14 Defendant testified that, when the agents stopped him, they had only asked him for
15 his name. *Id.* at 67, 77. He later admitted that the agents had asked for his date of birth. *Id.*
16 at 120. Defendant gave them his name and his permission to search his trunk. *Id.* at 67. He
17 did not tell them that he was a United States citizen or that his visa had expired. *Id.* at 77.
18 He testified that he had asked if he was free to go home “[e]very minute,” “every
19 interaction,” after “[e]very question that they asked.” *Id.* at 68. Around 9:00 p.m., the
20 agents let him call his attorney, but they required that he do so on speaker. *Id.* at 75, 76. He
21 was unable to reach his attorney after two attempts, so he called a friend in law
22 enforcement. *Id.* at 74-76. Before agents took him out of the car, he asked to call his wife,
23 and they acquiesced. *Id.* at 76. Agents told him he was under arrest and took him to the
24 Border Patrol Station. *Id.* at 78.

25 According to Defendant, the agents put him into a cell, where he was stressed and
26 crying. *Id.* at 78-79. Defendant testified that an agent had come into his cell and told him
27 “things would be much worse” if he did not talk to them. *Id.* at 82-83. The agent promised
28 Defendant he could go home if he cooperated. *Id.* at 83. Defendant testified the agent

1 returned and showed him “a plastic bag with the laboratory result of a drugs that was test
2 positive they said it was found in [Defendant’s] car.” *Id.* at 85. Defendant claimed the agent
3 threatened to “use” the test results against him unless he talked. *Id.* at 86. So, he agreed to
4 talk. *Id.* at 89. During the interrogation, he did not mention the plastic bag because then he
5 “would incriminate [him]self.” *Id.* at 111. He also characterized his questions about “what
6 can be done” as his attempt to “talk to the[agents] about the conversation” he had with
7 them in his cell. *Id.* at 114-15. He also testified that he had been desperate, so he had
8 exaggerated his participation and knowledge to convince the agents he had helpful
9 information. *Id.* at 117-18.

10 Defendant testified that, after the interrogation, agents had taken his fingerprints. *Id.*
11 at 84-85. He said this had been when agents discovered his visa had expired and when they
12 offered him food for the first time. *Id.* at 78, 86.

13 **Procedural History**

14 On December 20, 2019, the Government offered Defendant a pre-indictment plea,
15 which Defendant rejected. (Doc. 94-1.) On January 2, 2020, the grand jury returned a
16 three-count indictment, charging Defendant with the following: Count One knowingly and
17 intentionally conspiring to transport two undocumented immigrants and Counts Two and
18 Three transporting the two undocumented immigrants named in Count One. (Doc. 35.) On
19 January 28, 2020, the parties participated in video depositions of the three of the four
20 undocumented immigrants detained as material witnesses. (Doc. 49.) Fernando
21 Lucrecio-Morales was released without completing a deposition because there was not an
22 interpreter available in his native language, Nahuatl. (Doc. 126 at 6.) Lucrecio-Morales
23 appears to have been the individual Defendant refused to transport. (Doc. 125-2 at 1.) The
24 AUSA said that it “would just not be calling him as a witness, [and at trial the deposition
25 was] not necessary to move forward with the government’s case.” (Doc. 126 at 4:13-14.)

26 After the video depositions, on March 11, 2020, the Government presented the case
27 to the grand jury again. (Exh. 11.) The grand jury returned a nine-count superseding
28 indictment charging Defendant as follows: Count One knowingly and intentionally

1 conspiring to transport all four undocumented immigrants, Counts Two through Five
 2 harboring or transporting the four immigrants, and Counts Six through Nine transporting
 3 the four immigrants. (Doc. 70.) Defendant then filed his motions and the Court conducted
 4 an evidentiary hearing. (Docs. 88, 89, 94, 163, 173.)

5 This Court took the matter under advisement. (Doc. 173.)

6 **DISCUSSION**

7 Defendant asserts that agents detained him for an unreasonable amount of time and
 8 arrested him absent probable cause. (Doc. 89 at 5.) He requests suppression of any evidence
 9 following these illegal seizures. *Id.* at 6.

10 **Stop**

11 In *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968), the Supreme Court of the United States
 12 recognized that an officer's reasonable suspicion that criminal activity is afoot permits a
 13 brief stop to investigate further. Reasonable suspicion is a lesser standard than that of
 14 probable cause. *United States v. Valdez-Vega*, 738 F.3d 1074, 1078-80 (9th Cir. 2013). It
 15 exists when an officer can "point to specific and articulable facts, which, taken together
 16 with rational inferences from those facts, reasonably warrant th[e] intrusion." *Terry*, 392
 17 U.S. at 21.

18 In the context of border patrol stops, the totality of the circumstances may
 19 include characteristics of the area, proximity to the border, usual patterns of
 20 traffic and time of day, previous alien or drug smuggling in the area, behavior
 21 of the driver, appearance or behavior of passengers, and the model and
 22 appearance of the vehicle. Not all of these factors must be present or highly
 probative in every case to justify reasonable suspicion. And the facts must be
 filtered through the lens of the agents' training and experience.

23 *Valdez-Vega*, 738 F.3d at 1079 (citations omitted).

24 A *Terry* stop must end when either the "mission" of the stop is addressed or
 25 reasonably should have been. *See Rodriguez v. United States*, 575 U.S. 348, 354 (2015).
 26 This provides time to conduct the "ordinary inquiries incident" to a stop. *Id.* at 355 (quoting
 27 *Illinois v. Caballes*, 543 U.S. 405, 408 (2005)). "In assessing whether a detention is too
 28 long in duration to be justified as an investigative stop, [courts] consider it appropriate to

1 examine whether the police diligently pursued a means of investigation that was likely to
2 confirm or dispel their suspicions quickly” *United States v. Sharpe*, 470 U.S. 675, 686
3 (1985). Officers may extend a stop if the individual’s answers do not dispel their suspicions
4 and actually created new ones. *United States v. Rodgers*, 656 F.3d 1023, 1027 (9th Cir.
5 2011) (quoting *United States v. Torres-Sanchez*, 83 F.3d 1123, 1128 (9th Cir. 1996)).

6 Here, defense counsel conceded at the evidentiary hearing “that the[agents] had
7 founded suspicion to make the stop.” (Doc. 177 at 186.) Instead, he argues that once agents
8 saw he was alone in the car, the stop should have ended. (Doc. 89 at 5.) This fails for two
9 reasons. First, the stop was extended because Defendant refused to provide identifying
10 information to the agents and an officer. (Doc. 164 at 105-06, 240, 243-44) Defendant’s
11 attempts to argue that he was under no obligation to provide his date of birth and that this
12 was a roving immigration stop are unavailing. (Doc. 177 at 139, 189.) Defendant was
13 required to carry his identification, *see* 8 U.S.C. § 1304(e), and his driver’s license, *see*
14 A.R.S. § 28-3169(A). The date of birth permits law enforcement agents to check
15 immigration and warrant status. Therefore, they were unable to perform “ordinary inquiries
16 incident” to a lawful immigration stop, such as check immigration or warrant status. *See*
17 *Rodriguez*, 575 U.S. at 355 (quoting *Caballes*, 543 U.S. at 408). Defendant conceded that
18 agents had reasonable suspicion for the initial stop. (Doc. 177 at 186.) In conjunction with
19 his nervous demeanor, his previous actions provided reasonable suspicion for agents to
20 continue detaining Defendant.

21 Second, the agents’ reasonable suspicion that Defendant had transported
22 undocumented immigrants did not dissipate simply because they failed to catch him
23 red-handed or because agents had been mistaken about the number of individuals to enter
24 or exit the vehicle. In fact, Agent Barron testified that based on his training and five years
25 of experience Defendant’s demeanor had indicated “something’s going on.” (Doc. 164 at
26 230, 240.) The agents took a reasonable amount of time to conduct the knock-and-talk,
27 which would quickly dispel or confirm their suspicions that Defendant had picked up
28 undocumented immigrants and had dropped at least two back at the stash house. *Id.* at 62,

1 271-72. Thus, the agents only held Defendant for the time necessary to dispel their
 2 suspicions. Moreover, Defendant's demeanor and failure to answer their questions actually
 3 created new suspicions. The stop was not impermissibly extended and was lawful.

4 This Court recommends denying Defendant's motion to suppress evidence based on
 5 an illegal extension of a *Terry* stop.

6 **Arrest**

7 A warrantless arrest is constitutional if officers have probable cause to believe the
 8 individual committed a felony and the arrest occurs in a public place. *Maryland v. Pringle*,
 9 540 U.S. 366, 370 (2003). Probable cause has not been reduced to a precise or finely tuned
 10 standard; instead, it is fluid and relies on the totality of the circumstances. *Cf. Florida v.*
 11 *Harris*, 568 U.S. 237, 243-44 (2013) (considering warrantless search). It "exists when
 12 officers have knowledge or reasonably trustworthy information sufficient to lead a person
 13 of reasonable caution to believe that an offense has been or is being committed by the
 14 person being arrested" or when "a prudent person would have concluded that there was a
 15 fair probability that [the defendant] had committed a crime." *United States v. Lopez*, 482
 16 F.3d 1067, 1072 (9th Cir. 2007) (alteration in *Lopez*) (quoting *United States v. Smith*, 790
 17 F.2d 789, 792 (9th Cir. 1986)). "While conclusive evidence of guilt is of course not
 18 necessary under this standard to establish probable cause, '[m]ere suspicion, common
 19 rumor, or even strong reason to suspect are not enough.'" *Id.* (alteration in *Lopez*) (quoting
 20 *McKenzie v. Lamb*, 738 F.2d 1005, 1008 (9th Cir. 1984)).

21 Here, at the time of arrest, agents knew the following: a stash house close to the
 22 border with recent smuggling activity had items consistent with a smuggling operation,
 23 such as camouflage clothing and trash. (Doc. 164 at 64, 66, 232.) A known smuggling
 24 coordinator walked out of the house and looked around the street as if he were waiting for
 25 someone. *Id.* at 70. Thereafter, Defendant drove up to the house; four individuals ducked
 26 down and ran to his car, at least two quickly jumped inside. *Id.* at 50, 59. An agent later
 27 identified two of these individuals as two of the four undocumented immigrants found at
 28 the stash house. *Id.* at 66. The car was registered to a Tucson address, which is common in

1 smuggling operations. *Id.* at 70, 267. Defendant drove evasively, as though he thought
 2 someone were following him. *Id.* at 57. The agents believed Defendant had identified their
 3 surveillance, and consistent with their belief, Defendant returned to the stash house and
 4 dropped off his passengers. *Id.* at 59. Defendant then left the stash house and drove to two
 5 separate gas stations without purchasing gas. *Id.* at 174, 195, 196, 237. After Defendant
 6 was stopped, he appeared very nervous, and refused to completely identify himself. *Id.* at
 7 240. Given these known facts, there was a fair probability that Defendant had transported
 8 undocumented immigrants and conspired with others to do so. Therefore, the agents had
 9 probable cause to arrest Defendant.

10 This Court recommends denying Defendant's motion to suppress because of an
 11 illegal arrest. The arrest was supported by probable cause.

12 **Statements**

13 Defendant moves to suppress all his statements taken contrary to his Fifth and Sixth
 14 Amendment rights to counsel. (Doc. 88.) He argues that agents violated his rights by
 15 initiating a custodial interrogation after he had requested to speak with a lawyer. *Id.* at 5.
 16 He also asserts that the agents acted coercively and deceptively, such that his statements
 17 were involuntary and must be suppressed for all purposes. *Id.* at 6.

18 The Government contends that when Defendant asked to call an attorney he was not
 19 in custody and that he waived his *Miranda* rights once under arrest. (Doc. 96 at 5-6.) The
 20 Government also denies that the agents threatened or coerced Defendant. *Id.* at 7.

21 **Fifth Amendment**

22 The Fifth Amendment prohibits a person from being "compelled in any criminal
 23 case to be a witness against himself." U.S. Const. amend. V. Because the "circumstances
 24 surrounding in-custody interrogation can operate very quickly to overbear" an individual's
 25 will, the Supreme Court has held that an individual "must be clearly informed that he has
 26 the right to consult with a lawyer" prior to a custodial interrogation. *Miranda v. Arizona*,
 27 384 U.S. 436, 469, 471 (1966). "Custody" requires a fact intensive question of whether,
 28 when considered objectively, a "reasonable person [would] have felt he or she was not at

1 liberty to terminate the interrogation and leave.” *Howes v. Fields*, 565 U.S. 499, 509 (2012)
 2 (alteration in *Howes*) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)). These
 3 rights may be waived, but the waiver must be voluntary, knowing, and intelligent. *Moran*
 4 *v. Burbine*, 475 U.S. 412, 421 (1986).

5 Here, during the stop, Defendant asked to speak with his lawyer, and the agents
 6 allowed him to make several calls. (Doc. 164 at 201, 244; Doc. 177 at 76-77.) Defendant
 7 attempted to call his attorney twice, but he did not reach him. (Doc. 177 at 76, 101; Exh.
 8 62 at A3.) Thereafter, the agents learned that two of Defendant’s passengers had been
 9 undocumented immigrants, and they arrested him. (Doc. 164 at 203, 245.) Agents then
 10 transported Defendant to a Border Patrol Station. *Id.* at 246. Sometime later, they initiated
 11 a custodial interrogation. (Exh. 9.) Before questioning Defendant, Agent Barron read the
 12 *Miranda* rights to Defendant. *Id.* at 3-4. And Defendant agreed to talk with agents without
 13 an attorney present. *Id.* at 4.

14 First, Defendant was not in custody when he asked for an attorney. This was a
 15 road-side *Terry* stop based on founded suspicion that had not yet risen to the level of
 16 probable cause to arrest. *See United States v. Galindo-Gallegos*, 244 F.3d 728, 732 (9th
 17 Cir. 2001) (considering a rural stop persons close to international border). *Terry* stops
 18 usually do not constitute custody. *See United States v. Bautista*, 684 F.2d 1286, 1291 (9th
 19 Cir. 1982). As discussed above, the stop was not longer than was reasonably necessary.
 20 Thus, Defendant was not in custody for the purpose of *Miranda* until agents told Defendant
 21 he was under arrest, well after he had asked for and attempted to contact his attorney.
 22 Defendant requested an attorney prior to being in custody.

23 Second, the Supreme Court has “never held that a person can invoke his *Miranda*
 24 rights anticipatorily, in a context other than ‘custodial interrogation.’” *See Bobby v. Dixon*,
 25 565 U.S. 23, 28 (2011) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991)).
 26 Further, the Court of Appeals for the Ninth Circuit has stated that based on *McNeil* and
 27 *Bobby* a request for a lawyer outside a custodial interrogation does not warrant protections
 28

1 under *Miranda* or *Edwards*.⁶ See *Robertson v. Pichon*, 849 F.3d 1173, 1185 (9th Cir. 2017)
 2 (concluding that “if a defendant is not in the context of custodial interrogation . . . the
 3 safeguards of *Miranda* and *Edwards* are inapplicable” and “even if the defendant had
 4 previously invoked *Miranda* and *Edwards* before being placed in a custodial interrogation
 5 context” there would not be protection under *Edwards*). Thus, Defendant’s out-of-custody
 6 request for an attorney did not trigger protection under *Miranda* or *Edwards*. Therefore,
 7 agents were permitted to initiate a custodial interrogation, and if Defendant waived his
 8 *Miranda* rights, as was done here, the statement would not violate Defendant’s rights. (Exh.
 9 9 at 3-4.) Hence, the agents’ actions did not run afoul of *Miranda* or Defendant’s Fifth
 10 Amendment rights.

11 Thus, this Court recommends denying Defendant’s motion to suppress statements.
 12 Agents did not violate *Miranda* when taking the statements.

13 ***Voluntariness***

14 Defendant claims that agents threatened him with “a bag of alleged narcotics” and
 15 coerced him into making an involuntary statement. (Doc. 88 at 6.) He also asserts that
 16 agents made improper promises that if he cooperated, he would be able to go home. (Doc.
 17 104 at 4; Doc. 177 at 183.) The Government disputes the facts of Defendant’s claim. (Doc.
 18 96 at 6-7.)

19 Voluntary confessions are “the product of a rational intellect and a free will.”
 20 *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). A statement is involuntary if law
 21 enforcement officers used physical intimidation or psychological pressure to coerce a
 22 suspect. See *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *United States v. Tingle*, 658
 23 F.2d 1332, 1335 (9th Cir. 1981). Courts must consider if a defendant’s “will was overborne
 24 by the circumstances” around the confession, including characteristics of defendant and
 25 those of the interrogation. *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (internal
 26 quotation marks omitted).

27 Defendant’s account of the incident is central to this issue. The Court does not find
 28

⁶*Edwards v. Arizona*, 451 U.S. 477 (1981).

1 Defendant's allegations that Agent Marrufo threatened him to be credible. In general,
2 Defendant's testimony was incredible. Defendant contradicted himself throughout his
3 testimony and told an untenable story. He initially stated he had been taking the passengers
4 to Phoenix, then changed the location, saying the passengers were going to Tucson to go
5 Christmas shopping. (Doc. 177 at 56.) According to Defendant, he had been contracted to
6 take the passengers to Tucson to stay the night, so they could shop for Christmas the next
7 day, then he would return them to Douglas, for which he was to be paid a thousand dollars.
8 *Id.* He refused to drive the fourth passenger, even though his agreement was apparently for
9 a flat rate—not per passenger as stated during the interrogation—because the passengers
10 would not have room for their “groceries.” (*Id.* at 56-57, 59; Exh. 9 at 13.) It is unclear
11 why the “Christmas presents” or “groceries” would not fit into the car's trunk, why the
12 passengers would not just go to Tucson the next day—eliminating the expense of a hotel—
13 or why they would not have just taken a shuttle from Douglas to Tucson for considerable
14 less money. Additionally, although no longer employed in the medical profession,
15 Defendant wore his scrubs and did not bring his driver's license. This is inexplicable given
16 Defendant was acting as a paid chauffeur. (Doc. 164 at 121, Exh. 9 at 36.) He also testified
17 that agents had only asked for his information—not his date of birth—later admitting that
18 two agents and a deputy had asked for his date of birth. (Doc. 177 at 77:7-10, 119-20.) His
19 testimony was not plausible. Also, his demeanor was not that of an honest but nervous
20 witness, but instead was that of a fabricator. Finally, his claims that the agents had made
21 explicit promises to release him and to not charge him the narcotics if he talked are
22 inconsistent with his numerous requests to know what the agents could do for him and his
23 overall demeanor during the interrogation. (Exh. 9 at 31, 33, 35, 44-45, 47, 49, 54.) This
24 Court finds Defendant's testimony was not credible. Accordingly, this Court finds that the
25 agents did not threaten Defendant with a baggie or explicitly promise him he would go
26 home if he cooperated.⁷

27 ⁷The Government does not explain the bag, but there are alternative explanations. The most
28 likely of which is that the bag contained medicine Defendant had requested. The timing of
this request is not clear in the record, it either happened before or during fingerprinting.
Also, the record does not help determine when Defendant was fingerprinted. Defendant

1 Instead, this Court finds the agents' testimony to be credible. Here, Agent Marrufo
2 testified that had advised Defendant to tell the truth, that telling the truth could only help
3 him and that it would "behoove[]" him to do so. (Doc. 164 at 112-13.) He added, "There's
4 an old saying the truth will set you free" (Exh. 9 at 46.) And he questioned Defendant's
5 information, stating "If you think you're unique and have all this information that's going
6 to liberate you" *Id.* at 51. Defendant apparently took these as promises that he would
7 be released if he provided information. (Doc. 177 at 122, 125-26.) Agent Barron told him
8 that the agents could not "do anything or nothing can happen unless [he] provide[d] [them]
9 with something," stressing that honesty was key. (Exh. 9 at 11-12.) Agent Marrufo
10 explained

11 So we can't promise you anything. The only thing we can do and our job is—
12 right here is to take down the information. Now, whether it's truthful or
13 you're withholding stuff and not being completely truthful, that's what
14 somebody else will read this report, higher up, and they will—they can
15 determine whether or not your—your information is credible, where they can
16 maybe do something for you or not. Our job here is to get the information
17 and the facts.

18 (Exh. 9 at 45.) Agent Marrufo told Defendant he would see a judge "regardless." *Id.* at 49.
19 When Agent Barron told him someone else would evaluate his information, Defendant
20 asked to speak with someone else. *Id.* at 52. Near the end of the interrogation, the agents
21 asked Defendant if he spoke voluntarily; he said he "thought that [he] was going to get . . .
22 something in return" and the agents had "kind of" promised him things. *Id.* at 53. He then
23 offered to wear a "bug" as the agents were ending the interrogation. *Id.* at 54, 55.

24 Considering the potential implied promises that the truth would help Defendant and
25 that the agents would take the information to their "higher up," this Court recommends
26 finding that the statements were voluntary. Defendant is over forty years old, well

27 _____ attempted to argue he was not fingerprinted until 5:00 or 6:00 a.m., but defense counsel
28 did not properly refresh the agent's recollection with the agent answering, "Possibly.
Again, I'm not sure." (Doc. 177 at 33.) Defendant testified that he was not fingerprinted
until after the interrogation, but also stated that agents had not discover he was an overstay
until he was fingerprinted. *Id.* at 77-78, 84-85. Agent Marrufo claimed to talk to Defendant
about his status before the interrogation, and Defendant's status was referenced during the
interrogation. (Doc. 164 at 126, Exh. 9 at 13.)

1 education, fluent in English, and has been in the United States for well over a decade. (Doc.
 2 177 at 53-54.) Before the interrogation, he slept in the cell and was not denied food or
 3 drink, as far as the Court is aware. (Doc. 177 at 86-87.) After looking at the totality of the
 4 circumstances, the general promises that telling the truth would be better and that the agents
 5 would take the information to their superiors were insufficient to overbear Defendant's free
 6 will. *See United States v. Leon Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988) (promises
 7 that agent would inform prosecutor of cooperation did not render statements involuntary).

8 This Court recommends denying Defendant's motion to suppress involuntary
 9 statements.

10 ***Sixth Amendment***

11 The right to counsel is rooted in both the Fifth and Sixth Amendments of the United
 12 States Constitution. *See McNeil*, 501 U.S. at 175 (considering Sixth Amendment right to
 13 counsel); *Moran*, 475 U.S. at 420 (explaining *Miranda* required law enforcement to inform
 14 suspects that, among other rights, they had right to counsel under Fifth Amendment). Here,
 15 there has been no indication or argument that any of the statements were taken after an
 16 adversarial judicial proceeding had commenced; thus, the Sixth Amendment had not
 17 attached and does not provide relief to Defendant. *See McNeil*, 501 U.S. at 175 (quoting
 18 *United States v. Gouveia*, 467 U.S. 180, 188 (1984)). Accordingly, this Court recommends
 19 denying any relief under the Sixth Amendment.

20 **Prosecutorial Vindictiveness/Misconduct**

21 Defendant argues that the Government acted vindictively by seeking a superseding
 22 indictment after Defendant had rejected a plea offer and had exercised his right to confront
 23 the material witnesses. (Doc. 94 at 5.) He maintains that the Government presented false
 24 or deceptive testimony to the grand jury and misled Defendant as to importance of
 25 Fernando Lucrecio-Morales. *Id.* at 5-6. He asks that the entire indictment be dismissed and
 26 that the Government's offer to dismiss only Count Nine and strike Lucrecio-Morales be
 27 denied.⁸ (Doc. 94 at 1; Doc. 177 at 178.)

28 ⁸The record does not reflect that the Government has moved to strike Lucrecio-Morales
 from the indictment or dismiss any of the counts. To the extent the Government has

1 Due process prohibits prosecutors from penalizing a defendant for exerting their
2 constitutional or statutory rights. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). When
3 there exists a reasonable likelihood of vindictiveness, courts will presume the prosecutor
4 was vindictive in increasing the number or severity of charges. *See United States v.*
5 *Goodwin*, 457 U.S. 368, 373 (1982). Generally, this presumption does not arise pretrial
6 because “the prosecutor may uncover additional information that suggests a basis for
7 further prosecution, or he simply may come to realize that information possessed by the
8 [government] has a broader significance.” *Id.* at 381 (“At this stage of the proceedings, the
9 prosecutor’s assessment of the proper extent of prosecution may not have crystallized.”);
10 *United States v. Brown*, 875 F.3d 1235, 1240 (9th Cir. 2017). Absent a presumption,
11 Defendant can succeed by showing actual vindictiveness. *Wasman v. United States*, 468
12 U.S. 599, 569 (1984); *Nunes v. Ramirez-Palmer*, 485 F.3d 432, 442 (9th Cir. 2007).

13 Here, the Government offered Defendant a pre-indictment plea, informing him it
14 would be withdrawn if he did not accept by the upcoming status conference. (Doc. 94-1.)
15 Defendant did not accept, and as promised, the Government withdrew the offer. This was
16 not vindictive. *See Bordenkircher*, 434 U.S. at 363 (permitting “give-and-take” of plea
17 negotiations if defendant is free to accept or reject). The grand jury returned a three-count
18 indictment. (Doc. 35.) Following video deposition for three material witnesses, the parties
19 agreed that Fernando Lucrecio-Morales could be released without completing his
20 deposition. (Doc. 49.) Defendant claims that the prosecutors did not discover any new
21 evidence between the original and superseding indictment. (Doc. 94 at 3.) The Government
22 contends that it reexamined the facts of this case after the video deposition and decided to
23 pursue more charges via the *Pinkerton* theory of liability. (Doc. 121-2 at 2-3.) This is the
24 exact reason there is no presumption of vindictiveness pretrial, so prosecutors may
25 reconsider evidence before their assessment has crystallized. *See Goodwin*, 457 U.S. at
26 381. It is possible that the Government was impressed with the video depositions or that a
27 different prosecutor evaluated the evidence differently. There was no misconduct,
28 attempted to do so, Defendant has objected. (Doc. 177 at 178.) Accordingly, the Court will
make no recommendation or ruling on the Government’s offer.

1 presumed or actual, in seeking a superseding incitement in this matter.

2 Defendant asserts that the AUSA articulated that Lucrecio-Morales “would no
3 longer be an issue.” (Doc. 94 at 6.) This is not what the AUSA said; he expressed that he
4 “would just not be calling him as a witness, [and at trial the deposition was] not necessary
5 to move forward with the government’s case.” (Doc. 126 at 4:13-14.) However, given the
6 misunderstanding by Defendant, the Government has proposed striking Lucrecio-Morales
7 from the indictment; the Court understands this offer to be gratuitous, especially as it does
8 not find any prosecutorial misconduct here. The Government is not obligated to call every
9 witness or person who may have information. *Cf. United States v. Bond*, 552 F.3d 1092,
10 1097 (9th Cir. 2009) (prosecution not obligated to call every witness on witness list).
11 Accordingly, the AUSA was not dishonest and will have to make the case without
12 Lucrecio-Morales.

13 The Government presented the case to the grand jury for a superseding indictment
14 in March 2020, more than a month after the depositions. (Exh. 11.) Defendant alleges that
15 the AUSA presented false testimony to the grand jury. (Doc. 94 at 6.) The AUSA asked
16 the following questions that are relevant to our inquiry: “[D]id a border patrol agent believe
17 he saw four people run from the house to the car, crouching as if to hide from view?”; “Did
18 it appear that [Defendant] sensed he was being followed and he drove back toward the
19 house?”; “Did he pull over, and did border patrol agents see two individuals run back to
20 the house?”; “According to [Defendant], did he pull up to the house four people ran out,
21 he told one to go back in, three got in and he drove them away?”; “Did he claim to have
22 dropped them off after he felt he was being followed?” (Exh. 11 at 2-5.) The case agent
23 answered in the affirmative to each of those questions. *Id.* These questions are not false
24 and when taken together are not misleading; instead, they present a full picture of each
25 side’s contentions. The AUSA did not discuss the material witnesses’ statements or
26 deposition except to say that three material witnesses identified Ramos as the man driving
27 the car. *Id.* at 7. It is not required to present all potential evidence to the grand jury. *Cf.*
28 *United States v. Navarro*, 608 F.3d 529, 537 (9th Cir. 2010) (explaining that prosecutors

1 do not have a duty to present exculpatory evidence to grand jury).

2 The grand jury returned a nine-count superseding indictment against Defendant.
 3 (Doc. 70.) Defendant argues that there is no evidence to support some of these charges.
 4 (Doc. 94 at 5.) These new charges are supported by the *Pinkerton* theory of liability, which
 5 “renders all co-conspirators criminally liable for reasonably foreseeable overt acts
 6 committed by others in furtherance of the conspiracy they have joined, whether they were
 7 aware of them or not.” See *United States v. Hernandez-Orellana*, 539 F.3d 994, 1007 (9th
 8 Cir. 2008). For example, to transport undocumented immigrants, it may be foreseeable that
 9 members of the conspiracy will harbor those undocumented immigrants in furtherance of
 10 the transportation conspiracy.


11 This Court recommends denying Defendant’s motion to dismiss. There has been no
 12 showing of prosecutorial misconduct or vindictiveness.

13 **RECOMMENDATION**

14 Accordingly, it is recommended that, after its independent review of the record, the
 15 District Court deny Defendant’s motions (Docs. 88, 89, 94). Pursuant to Federal Rule of
 16 Criminal Procedure 59(b)(2), any party may serve and file written objections within
 17 fourteen days of being served with a copy of this Report and Recommendation. A party
 18 may respond to the other party’s objections within fourteen days. No reply brief shall be
 19 filed on objections unless leave is granted by the District Court. If objections are not timely
 20 filed, they may be deemed waived.

21 Dated this 5th day of February, 2021.

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Honorable D. Thomas Ferraro
 United States Magistrate Judge